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# Supreme Court of the United States

October Term 1957

No. 683

SCIENTIFIC LIVING, INC., a corporation,
*Petitioner*

v.

FEDERAL TRADE COMMISSION,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# Supreme Court of the United States

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SCIENTIFIC LIVING, INC., a corporation,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Scientific Living, Inc., petitioner, prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered September 3, 1957, denying petitioner's motion to vacate order of said Court, entered August 12, 1957, dismissing the petitioner's appeal to reverse the judgment of the District Court.

### OPINION BELOW

There was no opinion of the Court of Appeals other than its orders which are found on pages 5 and 9 of the appendix attached hereto.

### JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1957, and is printed in the appendix, hereto, infra, p. 9.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1), 62 Stat. 928, and 28 U.S.C.A. Sec. 2101(c).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals was justified in dismissing the appeal of an "alter ego" corporation, when owner thereof is unable to seasonably prosecute said appeal because of his imprisonment?

2. Whether the Court of Appeals was correct in denying petitioner's motion to vacate the order of dismissal and reinstate the appeal, when the Courts attention is directed to the imprisonment of the owner of said "alter ego" corporation.

## RULES INVOLVED

(a) Rules 24(3) and 25(1) of the Court of Appeals.

(b) Rule 73(a) of the Federal Rules of Civil Procedure.

## STATEMENT

This was an original appeal from an order and final judgment of the District Court for the Middle District of Pennsylvania. The record on appeal was filed May 29, 1957, in the Court of Appeals for the Third Circuit. The petitioner is the "alter ego" corporation of Adolphus Hohensee, who began serving his sentence of 1 year and a day at the Federal Penitentiary, Lewisburg, Pa., on June 24, 1957, after this Court denied certiorari. 353 U.S. 976, 77 S. Ct. 165, 1 L. Ed. 2d 1136. Rehearing denied 354 U.S. 927, 77 S. Ct. 1376, 1 L. Ed. 2d 441.

The "Motion To Vacate Order" dismissing petitioner's appeal, see Appendix p. 6, sets forth in detail the reasons for the failure to timely prosecute the appeal. The said motion directed the attention of the Court of Appeals to the imprisonment of the said Adolphus Hohensee, and that the failure to prosecute, during the time allowed by the

rules, was rendered impossible by the action of the Government. That the said Adolphus Hohensee was not permitted to receive any document while imprisoned at the time. That he had been mistreated in prison and confined to the prison hospital.

The petitioner was without the representation of counsel after the appeal was docketed in the Court of Appeals, and because of the said imprisonment of its owner and president, it was unable to go forward with the prosecution of its appeal at the time of the dismissal.

The said motion to vacate sought permission of the Court of Appeals to reinstate the appeal in order that the material errors complained of in the appeal might have been corrected.

It is from the denial of the motion to vacate the order dismissing the appeal that petitioner seeks a Writ of Certiorari to the Third Circuit.

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, dismissing the petitioner's appeal and denying petitioners motion to vacate said order clearly show an abuse of discretion on the part of the Court. It must be conceded by the respondent that the position taken by the Government in the case of *Hohensee* v. *United States*, 3 Cir., 243 F. 2d 367, certiorari denied 353 U.S. 976, rehearing denied 354 U.S. 927, was that the petitioner is the "alter ego" corporation of Adolphus Hohensee. When as in the instant case, the petitioner and Adolphus Hohensee were both convicted and sentenced by the District Court for the Middle District of Pennsylvania, and that petitioner's appeal to the Court of Appeals and to this Court was embraced in the above stated appeal of Adolphus Hohensee. The petitioner herein was without the advantage of counsel and without the service of its owner and president at the time of the dismissal of its appeal in the Court of Appeals.

The right to counsel has long since been declared by this Court as one of our constitutional heritages. See *Powell* v. *Alabama*, 287 U.S. 45, *U.S.* v. *Morgan*, 346 U.S. 502, and *Copolon* v. *U.S.*, 191 F.2d 749, certiorari denied 342 U.S. 926.

The position of petitioner at the time of the dismissal of its appeal was similar to the position of the appellant in the case of *Middleton* v. *Hartford Accident & Indemnity Co.*, 5 Cir., 119 F. 2d 721, and this petitioner was entitled to the consideration, there, accorded the appellant, instead of a dismissal of its appeal.

## ABUSE OF DISCRETION

It has been said that Rule 73(a) of the Federal Rule of Civil Procedure has created no new right of appeal but merely prescribes the manner in which an appeal when permitted by law may be taken, nor does it repeal 28 U.S.C., Sec. 466, which requires certificate of probable cause for an appeal in habeas corpus cases in which the detention is by virture of State process. Schenk v. Plummer, 113 F. 2d 726, 9 Cir.

An appeal will not be dismissed for failure to docket the record within 40 days after filing the Notice of Appeal where a substantial question is presented on the merits. Shannon v. U.S., 93 U.S. App. D.C. 406, 206 F. 2d 479.

In Des Isles v. Evans, 225 F. 2d 235, 5 Cir., the court said in refusing to dismiss an appeal in which the record was untimely filed, said inter alia:

> "The rules have for their primary purpose the securing of speedy and inexpensive justice in a uniform and well ordered manner, they were not adopted to set traps and pitfalls by way of technicalities for unwary litigants."

Failure to file the record and docket the appeal does not effect the validity of the appeal, but is ground for such action as the appellate court deems appropriate.

U.S. v. Fujisaki, 198 F. 2d 747, 9 Cir., U.S. v. Krause, 197 F. 2d 329, 9 Cir., Fong v. Glover, Ltd., 197 F. 2d 710, 9 Cir.

Since failure of an appellant to take future steps, after filing a Notice of Appeal, jurisdiction of the appellate court attaches at the time of the filing of the notice and whether a dilatory appellant shall be allowed to proceed is within the discretion of the appellate court. Ispass v. Pyramid Freight Corp., 152 F. 2d 619, 2 Cir.

In Mutual Benefit Health, etc. v. Snyder, 109 F. 2d 469, 6 Cir., the court said:

> "An appeal should not be dismissed for failure to file the record within the prescribed period if such failure was excusable."

The circumstances of the instant case discloses that the president of this "alter ego" corporation, as alleged by the government, was imprisoned while the appeal was pending and that due to his imprisonment he was unable to file the record in the third circuit before that court entered its order dismissing the appeal. This imprisonment, coupled with the inability to retain counsel to prosecute the appeal may be considered, under the cases cited above, as excusable neglect within the meaning of said Rule 73 (a).

## CONCLUSION

In the light of the reasons advanced and the circumstances outlined in the foregoing, petitioner urges this Court, in its capacity as the arbiter of the Federal system to grant this petition for writ of certiorari.

Respectfully Submitted,

FRANK R. COOK,
*Atty. for Petitioner.*

Date: Dec. 23, 1957

## APPENDIX

### UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 12,265

In the Matter of SCIENTIFIC LIVING, INC., a corporation,
*Appellant,*

v.

FEDERAL TRADE COMMISSION

---

### ORDER

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Present: BIGGS, *Chief Judge*, and GOODRICH and KALODNER, *Circuit Judges*

AND NOW, to wit, this 12th day of August, 1957 it is

ORDERED that the motion of the appellee to dismiss the appeal for want of timely prosecution be and the same hereby is granted and the appeal hereby is dismissed.

By the Court,

BIGGS, Chief Judge

# U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12265

SCIENTIFIC LIVING, INC., APPELLANT

*v.*

FEDERAL TRADE COMMISSION

## MOTION TO VACATE ORDER

Comes now the appellant in the above entitled cause and moves the court to vacate its order of the 12th day of August, 1957, dismissing the appeal "for want of timely prosecution" and to grant appellant other relief as requested below herein, and states as reasons therefor as follows:

1. That the government in its evidence produced in case 12529, U.S. District Court for the Middle District of Pa. contended that Scientific Living, Inc., is in fact Adolphus Hohensee. The government is bound by its proof. Therefore the Rule under which the action was brought does not apply.

2. That the government has made it impossible for appellant to prosecute the appeal in that the government has confined Adolphus Hohensee, Pres. of Scientific Living, Inc.

3. That the Department of Justice and Warden Taylor have obstructed justice in not permitting anyone to take any document, legal or business, to Adolphus Hohensee and discuss the same. Adolphus Hohensee has not been permitted to see or examine any document pertaining to this case.

4. That Adolphus Hohensee, has been denied the sight of a spiritual advisor, much less to confer with one, even though he is languishing in jail, was confined in the prison hospital and at times stretched out on a prison cot, near death, as a direct result of the wanton, reckless and malicious doping and drugging of him, with force of arms.

5. That Adolphus Hohensee was wrongfully convicted because he spoke and lectured against doping and drugging, and was thus sentenced to a year and a day in the Federal Penitentiary at Lewisburg, Pa.

6. That at the time Adolphus Hohensee entered the prison on June 24, 1957, his physical and mental condition was that of a healthy, vigorous, youthful and alert, robust man.

7. That since he was confined on June 24, 1957, in prison and with force of arms, was subjected to unconscionable, barbaric and modern medical tortures, including the injection by force, horror producing drugs and other narcotics, by the conspirator-defendants more fully designated and described in the Complaint, file no. 6016, U.S. District Court for the Middle District of Pa., in its motions and supporting affidavits, all of which is made a part hereof by reference.

8. That the entire record and clerks file in case No. 12529, is made a part hereof by reference, including the "FOUL BLOW" inflicted upon Adolphus Hohensee by the government prosecution, pointed out and made reference to by Chief Judge Biggs of the U.S. Court of Appeals, 3rd Circuit.

9. That appellant, on account of the acts complained of herein, has been irreparably damaged, and to further subject appellant to more of the same Gestapo Methods, to put it mildly, would be adding grave insult to serious injury.

10. That the efforts of the Federal Trade Commission, in the above entitled cause, is just a part of the GIGANTIC CONSPIRACY engineered by the MEDICAL and DRUG TRUSTS, which conspiracy has been in existence for about 30 years, to destroy and annihilate Hohensee and any corporation with which he is connected.

11. That appellant is pleading pro se in this cause for protection of civil rights, and the court should therefore endeavor to construe appellant's pleading without regard to technicalities. Picking et al. v. Penn. R. Co., 151 F. 2d 240.

WHEREFORE appellant prays that this court issue an appropriate order to:

1. Vacate its order of the 12th day of August, 1957, dismissing the appeal.

2. To reverse the judgment in the court below.

3. To restrain and enjoin the Federal Trade Commission from any further interference with appellant.

4. To grant other relief which to this court may seem just and proper.

/s/ GENE BASALYGA
GENE BASALYGA, secretary for Scientific Living, Inc., P.O. Box 910, Scranton, Pa.

# UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 12,265

FEDERAL TRADE COMMISSION

v.

SCIENTIFIC LIVING, INC., a corporation
*Appellant*

---

Present: BIGGS, *Chief Judge*, and GOODRICH and KALODNER, *Circuit Judges*

Upon consideration of the motion by appellant, filed August 19, 1957, to vacate the order of this Court dismissing the above entitled appeal, to reverse the judgment of the district court, and to restrain and enjoin the Federal Trade Commission from any further interference with appellant.

It is ORDERED that the motion be and it is hereby denied.

By the Court,

BIGGS, Chief Judge

Dated: September 3, 1957

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. 683

SCIENTIFIC LIVING, INC., PETITIONER

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINION BELOW

No opinion was rendered by the United States Court of Appeals for the Third Circuit.

### JURISDICTION

The judgment of the court of appeals dismissing the appeal was entered on August 12, 1957 (Pet. 6). On September 3, 1957 the court denied a motion to vacate the judgment of dismissal (Pet. 10). The time for filing a petition for certiorari was extended by Mr. Justice Brennan on December 3, 1957, to December 12, 1957, and on the latter date to December 22, 1957 (Sunday).[1] The petition for certiorari

[1] On January 4, 1958, Mr. Justice Brennan denied an application for a stay.

was filed on December 23, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

**QUESTION PRESENTED**

Whether the court of appeals properly dismissed petitioner's appeal for want of timely prosecution.

**RULE INVOLVED**

The pertinent portions of Rule 73 of the Federal Rules of Civil Procedure are as follows:

> Rule 73. *Appeal to a Court of Appeals.*
>
> (a) When and How Taken.
>
> * * * * *
>
> A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. * * *
>
> * * * * *

**STATEMENT**

On April 17, 1957, the District Court for the Middle District of Pennsylvania ordered compliance with a subpoena previously issued by the Federal Trade Commission which directed petitioner to produce designated books and documents. The subpoena was issued in the course of an investigation to determine whether petitioner, a corporation which sells and distributes in interstate commerce health foods and a cooking utensil, was complying with the Commission's 1953 order to cease and desist from making

certain misrepresentations as to the curative and health properties of its products.

On April 27, 1957, petitioner appealed from the order enforcing the subpoena to the Court of Appeals for the Third Circuit, and on May 29, 1957, it filed the record with that court (Pet. 2). Petitioner did not subsequently designate parts of the record for printing or file a brief and appendix as required by Rules 24 and 25 (Appendix, *infra*, p. 6) of the court, nor did it move for a continuance of the appeal. On August 12, 1957, the court of appeals dismissed the appeal "for want of timely prosecution" (Pet. 6).

On August 19, 1957, petitioner, through its secretary, moved to vacate the order of dismissal, alleging that petitioner's president, Hohensee, had begun service of a prison term (in an unrelated case) on June 24, 1957, and that Hohensee's imprisonment had made it impossible for petitioner to prosecute the appeal (Pet. 7–9). On September 3, 1957, the court of appeals denied this motion (Pet. 10). On October 7, 1957, the court denied a further motion (again filed by petitioner's secretary) to recall and stay the mandate pending the filing of a petition for certiorari.[2]

[2] After the mandate of the court of appeals had issued, the district court again directed compliance with the subpoena, and when petitioner refused to produce the documents held petitioner in contempt and fined it $3,000. Petitioner has appealed this order to the Court of Appeals for the Third Circuit, and its appeal has been docketed.

## ARGUMENT

Rule 73 (a) of the Federal Rules of Civil Procedure provides that the failure of an appellant to take "further steps" to perfect an appeal after filing notice thereof is ground for "such action as the appellate court deems appropriate, which may include dismissal of the appeal" (Rule 73 (a)). This provision is "intended to place reliance upon the sound discretion" of the court of appeals in disposing of dilatory appeals. *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, 704. In this case there is no basis for reversing the discretion exercised by the court of appeals in dismissing petitioner's appeal.

Petitioner plainly was in default of the Rules of the Court of Appeals for the Third Circuit in failing timely to prosecute its appeal. Although it filed the record in that court on May 29, 1957, it neither designated the parts of the record to be printed (which designation was due on June 8, 1957), nor filed its brief and appendix (which were due on June 28, 1957), as required, respectively, by Rules 24 (3) and 25 (1) (Appendix, *infra,* p. 6). The court entered its judgment dismissing the appeal on August 12, 1957, approximately six weeks after the brief and appendix were due, and petitioner made no attempt during the interval to obtain a continuance.

Petitioner contends (Pet. 3), however, that its default was justifiable because it was "without the advantage of counsel and without the service of its owner and president," Hohensee, who had been im-

prisoned in an unrelated case (Pet. 3). These facts do not, however, excuse petitioner's default. Despite Hohensee's imprisonment the corporation plainly was still able to prosecute the case, as shown by the fact that, after the appeal was dismissed, its secretary filed on its behalf motions to vacate the dismissal and to recall the mandate and has conducted other phases of the litigation. If petitioner desired to retain counsel, or if Hohensee's participation in the appeal had been necessary, the corporation, through its secretary, could have sought a continuance "for good cause," as provided by Rule 29 (5) (Appendix, *infra*, p. 7) of the Rules of the Court of Appeals for the Third Circuit.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*

VICTOR R. HANSEN,
*Assistant Attorney General.*

ERNEST L. FOLK, III,
*Attorney.*

EARL W. KINTNER,
*General Counsel,*

JAMES E. CORKEY,
*Assistant General Counsel,*
*Federal Trade Commission.*

JANUARY 1958.

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At the time of Hohensee's imprisonment on June 24, 1957, petitioner was already 16 days in default with respect to furnishing a designation of record, and 26 of the 30 days for filing its brief had elapsed.

# APPENDIX

## Pertinent Rules of the Court of Appeals for the Third Circuit

Rule 24. *Form and Contents of Briefs and Appendices. Printing of Briefs.*

* * * * * *

(3) *Statement of Contents of Appendix to be Furnished Appellee or Respondent.* The appellant or petitioner shall furnish appellee or respondent with a statement of the parts of the record he proposes to include in the appendix pursuant to paragraph (2) (c) of this rule. The statement shall be furnished within 10 days after the filing of the record in the clerk's office unless a joint appendix is to be filed under paragraph (6) of this rule in which case it shall be furnished on or before the day on which the brief of the appellant or petitioner is served and filed.

* * * * *

Rule 25. *Filing of Briefs and Appendices.*

(1) *Time of Filing Briefs—Number of Copies—Service of Copies—Reply Briefs.* Within 30 days after the record is filed with the clerk of this court the appellant or petitioner shall file with the clerk 20 copies of a printed brief and serve five copies thereof on each opposing counsel. The appellee or respondent shall in like manner file and serve a brief within 30 days after the filing and serving of the appellant's or petitioner's brief. The appellant or petitioner may in like manner file and serve a reply brief within 15 days after the filing and serving of the appellee's or respondent's brief. No other briefs may be filed without special leave of court.

* * * * * *

Rule 29. *Argument List.*

* * * * *

(5) *Continuance.* For good cause shown the court may pass a case or order its continuance for the term. * * *

* * * * *

(7) *Dismissal Where Appellant or Petitioner Does Not Appear.* Where no counsel appears for the appellant or petitioner and no brief has been filed for him, the court may on motion of the appellee or respondent or on its own motion dismiss the appeal or petition at the cost of the defaulting party.

* * * * *

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